

to cable programming. Comments are sought on the extent that the Commission may apply any related antitrust standards for price discrimination. The Commission also asks, once again, whether anticompetitive or "predatory" harm to competition in the distribution of programming is necessary in order for discrimination to occur.

42. As discussed above, the Cable Act does not involve an antitrust analysis. It does not require complicated, lengthy, and expensive enforcement mechanisms. Congress created an independent remedy to address the discrimination problem and delegated to the FCC the related regulatory responsibilities. Robinson-Patman Act decisions regarding goods or commodities of "like quality or service," as well as prior antitrust decisions concerning predatory harm, are inapplicable.

43. Option Four: Price Comparisons as Applied to Other Regulations (§ 23). *The Commission asks whether other areas of federal regulation might provide guidance. For example, the principles underlying the International Trade Association of the Commerce Department ("ITA") in anti-dumping analysis could be used to develop FCC regulations to implement 628.*

44. The Cable Act is not an "anti-dumping" statute, and it is not dependent on constructions of the ITA.

E. The Commission Should Adopt a Broad Attributable Interest Standard

45. The Commission notes that it must establish an ownership interest that will be considered "attributable." The Commission asks whether it should use the attribution threshold generally applicable to the broadcast industry (i.e., the 5% ownership standard), or whether it should use some type of behavioral guidelines to determine control irrespective of the attribution threshold (§ 9).

46. The Commission's selection of an appropriate attributable interest standard must take into account the purposes of Congress in enacting the strong program access provisions contained in Section 628 of the Cable Act.

47. The express purposes of Section 628 are to promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the

development of communications technologies. 47 U.S.C. 548(a). These statutory goals were established in light of Congressional findings that the cable industry had become vertically integrated, and that vertically integrated program suppliers had the "incentive and ability" to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies. Cable Act, Section 2(a)(5). Congress also found that the cable industry had become highly concentrated, which had the added potential effect of reducing the number of media voices available to consumers. Cable Act, Section 2(a)(4).

48. Congress, therefore, was keenly concerned about inappropriate incentives resulting from vertical integration, as well as the potential of cable concentration to reduce the number of media voices. In recognition of these facts, Congress enacted an entirely new and more comprehensive regulatory scheme for cable. The new Cable Act is designed, inter alia, to promote the availability to the public of a diversity of views and information through a variety of distribution media, and to ensure that the cable industry does not exercise undue market power. Cable Act, Section 2(b)(1), (5).

49. Within this context, the Commission must construe the concept of "attributable interests" liberally, with an eye toward achieving the public interest goals set by Congress. The Commission must select a broad attribution standard which recognizes the potential of cable operators to influence the price, terms and conditions under which a vertically integrated program vendor will sell or deliver programming.

50. The 5% broadcast attribution standard was created by the Commission to address concerns regarding "control" of licensed facilities, not the potential for undue influence.^{9/} The broadcast standard, therefore, may well be insufficient to correct the problems Congress associated with vertical integration in the cable programming market.

51. The cable industry itself already has opposed a 5% attribution standard as being inadequate to prevent abuses of power and undue influence in the video distribution market. When commenting on the Commission's proposal to liberalize the "cable/telco" cross ownership restrictions, cable operators argued that the potential for abuse and

^{9/} See, Attribution of Ownership Interests in Broadcasting, Cable Television and Newspaper Entities, 97 FCC 2d 997 (1984), recon. in part 58 RR 2d 604 (1985), further recon., 1 FCC Rcd 802 (1986).

discrimination by the telephone companies was too great to be controlled by the 5% broadcast attribution rule.^{10/} The cable companies urged the Commission to retain the complete ban on local telephone company ownership of companies providing cable television service.^{11/} For similar reasons, the 5% standard may be inadequate to satisfy Congressional objectives in adopting the Cable Act's program access provisions.

52. At this point, the Commission has not clarified exactly which or how many cable programmers would be governed by the 5% standard or any other standard.^{12/} It is essential that the scope and implications of any standard be determined before the standard is adopted. Moreover, before

^{10/} See, Telephone Company - Cable Television Cross-Ownership Rules, Second Report and Order, 7 FCC Rcd 5781, 5800 (1992).

^{11/} The then existing cable/telco cross-ownership restrictions, which the cable industry fought to retain, prohibited any element of ownership or financial interest, including a debtor-creditor relationship, between a local telephone company and a cable system, and allowed only 1% common ownership if either the telephone company or the cable system was a corporation with 50 or more stockholders. 47 C.F.R. 63.54; see also, General Telephone Co. of California, 4 FCC Rcd 5693 (1989) (the "Cerritos decision"); appeal sub. nom., NCTA v. FCC, 914 F2d 285 (D.C. Cir. 1990), remand pending.

^{12/} The cross-ownership relationships in the cable industry are extensive and complex. See, Cable Report, supra at 5106, Appendix G.

adopting any standard, the Commission must ensure that it is broad enough in scope to address fully the concerns of Congress.

F. The Commission Must Prohibit Exclusive Contracts in Noncabled Areas

53. The Commission states that under Section 628(c) (2) (C), exclusive contracts appear to be prohibited in areas not served by a cable operator, but may be permitted on a case-by-case basis in areas served by a cable operator based upon a public interest finding by the Commission. The Commission asks whether the lack of a reference to the public interest finding for contracts in areas "not served by a cable operator" means that Section 628(c) (2) (C) makes exclusive contracts in such areas a per se violation. The Commission seeks comment on how to determine whether an area is "served by a cable operator" (¶¶ 28-37).

54. In Paragraph 34, the Commission again argues that a specific showing of "harm" must be made before Section 628(c) (2) (C) can be violated. The Commission asks whether this Section imposes any duty on a programmer to deal with non-affiliated programming distributors in areas not served by a cable operator.

55. There should be no confusion as to whether exclusive contracts in noncabled areas are per se violations of Section 628(c)(2)(C). The statute states that the Commission must prohibit certain arrangements, including exclusive contracts, that prevent a distributor from obtaining programming from a vertically integrated program vendor in areas not served by a cable operator. Any fair reading of the statute makes it abundantly clear that exclusive contracts are prohibited.

56. Similarly, it is not difficult to determine what Congress meant when it referred to an area "not served by a cable operator." The Conference Report makes it clear that an area is "not served by a cable operator" if cable service is not available in that area for a standard connect fee, i.e., the home is not "passed" by cable. (Conf. Rep. No. 102-862 at 93).

57. As discussed above, an independent showing of "harm" is irrelevant under this Section. Clearly, the Cable Act requires that a programmer must deal with non-affiliated distributors that provide service in areas not served by a cable operator.

G. The Commission Must Establish Rules That Facilitate -- Not Discourage -- The Filing of Complaints

58. The Commission proposes to adopt rules governing formal complaints that would resolve disputes without a hearing unless there were substantial and material issues of fact. The Commission would require the complainant to establish a prima facie case. If this threshold is met, the staff would hold a status conference. Alternative Dispute Resolution ("ADR") proceedings would be possible. Discovery would be limited.

59. The Commission asks for comment on the standard that should be employed to determine whether a prima facie case has been made. Penetration benchmarks are considered as possible tools for measuring the availability of programming and ascertaining whether the behavior violates Section 628. Similarly, the Commission asks whether there are circumstances under which it would be appropriate to consider the relationship between the volume of programming sold to cable systems and to alternative delivery media (§ 38-49).

60. In its haste to develop rules which have a minimal effect on the cable "marketplace" and its own resources, the Commission has suggested unrealistic burdens for

distributors filing discrimination complaints. In particular, the Commission has overemphasized its own "ease of administration," while underemphasizing the public interest objectives to be accomplished by this statute. Never in its Notice does the Commission really stress the seriousness of the discrimination problem or the importance of correcting it. Only "lip service" is given to the promotion of new, competing technologies such as DBS, or to the critical issue of bringing rural Americans into the modern telecommunications age, as envisioned by Congress.

61. Rather than imposing unrealistic "harm" and other prima facie showings on complainants, the Commission should have made clear that any showing of discrimination constitutes a prima facie case and must be rebutted by the program vendor with clear and convincing evidence of justification in the nature of an affirmative defense. This statutory test is clearly set forth in the language of the Cable Act. The FCC need only implement it.

H. The Commission Must Produce Meaningful Annual Reports to Congress

62. *The Commission sketches at Paragraph 52 the general areas it intends to cover in its Annual Report to Congress: the status of complaints filed, the state of*

competition, etc. Surveys of the cable industry are considered.

63. In the past, the Commission has belittled complaints of discrimination by claiming that they were "anecdotal." Congress has now made clear its collective disagreement with that assessment. It is essential, during the Annual Report process mandated by Congress, that the Commission be required to provide a detailed and comprehensive update on the state of the video distribution marketplace. Simple "anecdotal" reports will not suffice.

I. Complaints Based on Discrimination are by Definition Not Frivolous

64. *The Commission asks for suggestions regarding the factors that should be considered in determining whether a complaint is frivolous and thus subject to penalties under Section 628(f)(3) (¶ 53).*

65. It should be made clear that whenever a distributor files a complaint based upon actual differences in prices, terms and conditions, that complaint is by definition not frivolous. Should the complaint ultimately be dismissed because the program vendor affirmatively shows that the discrimination was justified by one of the

enumerated factors, the complainant should not be punished. The complaint was not frivolous. Rather than discouraging such complaints, as the Commission apparently intends to do, it should encourage them to ensure that this longstanding problem is finally corrected, as Congress intended.

J. The Statutory Prohibitions Must Become Effective Immediately

66. *The Commission claims that the statute is "silent" with respect to the enforcement of antidiscrimination rules against existing contracts. The Commission tentatively concludes that any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively against existing contracts. The Commission seeks comment on whether it should establish a prospective deadline for compliance (§ 27).*

67. Congress was not "silent" on this issue, as the Commission claims. Congress specifically considered the grandfathering issue and determined to grandfather only certain exclusive contracts in cabled areas. [(See, 47 U.S.C. 548(h)]. All other contracts, obviously, were not grandfathered and must be brought into compliance with the new law.

68. Should the Commission prevail on this mistaken interpretation of the statute, the great bulk of what Congress intended to accomplish would be circumvented.

K. The Commission's Notice Fails to Meet Congressional Objectives

69. *The Commission asks whether the Notice reflects a correct understanding of Congressional objectives in enacting Section 628. The Commission notes that Congressional concerns were focused on vertical ownership relationships in the cable industry and the extent to which they may restrict the availability and increase the cost of programming. The Commission seems to emphasize throughout the item, however, that common ownership of cable systems and programming suppliers benefits the public. (Cf., ¶¶ 3-5)).*

70. The Commission's Notice is grossly out of sync with Congressional intention in acting the program access provisions. Rather than recognizing and dealing with the discrimination problem, as Congress has done, the Notice actually appears to be somewhat apologetic in regard to the imposition of any new requirements on vertically integrated

cable programmers.^{13/} The Commission seems to doubt a fundamental premise of the legislation: that vertically integrated programmers do unfairly discriminate against alternative distributors, which does restrain competition in program distribution (see, ¶ 7).

71. Ironically, in a recent trade press article, former FCC Chairman Sikes is reported to have said that the Commission's Cable Act proceedings are not even controversial, because "Congress left fairly strict instructions" as to what the FCC was to do. Comm. Daily, Warren Publishing, January 8, 1993. The fact of the matter, however, is that this proceeding has now become "controversial," because the Commission apparently has chosen to disregard clear Congressional instructions.

III. PROPOSED RULES

The responsibility of the Commission in implementing Section 19 is clear, but was largely ignored by the Commission in its Notice. The Commission is required to implement Section 19 by, at a minimum, prescribing

^{13/} For instance, the Commission states that vertical integration "contributes to an enriched quality of existing programming services..." (¶ 7).

regulations that "prohibit discrimination . . . in the prices, terms and conditions of sale or delivery of . . . programming . . ." The relevant statutory language should simply be incorporated directly into the Commission's rules.

A. Discrimination

It is recommended that the Commission adopt the following rule prohibiting discrimination, as required by Congress:

Discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups shall be prohibited, except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from --

(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of

satellite cable programming or satellite broadcast programming;

(iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributors.^{14/}

B. Exclusive Contracts in Noncabled Areas

Similarly, it is recommended that the Commission simply follow Congressional directives and implement into its rules the statutory prohibitions against exclusive contracts and other practices in areas not served by cable operators:

Practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator shall be prohibited. For purposes of this

^{14/} Relevant definitions contained in the statute should similarly be incorporated into the Commission's rules.

section, an area shall be considered to be "not served by a cable operator" if cable service is not available in that area for a standard connect fee (i.e., the home is not "passed" by cable).

IV. CONCLUSION

In most respects, the Commission's Notice fails to recognize the seriousness of the discrimination problem or the importance of correcting it. The Commission must redirect the thrust of its Notice to reflect strong Congressional interest in increasing competition in the programming market, increasing the availability of programming in rural and noncabled areas and spurring the development of new technologies. To accomplish these objectives, the Commission must adopt rules which, at a minimum, clearly and firmly prohibit discrimination.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative and the Consumer Federation of America urge the Commission to consider these Comments and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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